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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-467

AUBREY KAUFMAN,

Petitioner,

against

DIVERSIFIED INDUSTRIES, INC.,

Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 16, 1972

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OCTOBER TERM, 1972

No. 72-467

AUBREY KAUFMAN,

Petitioner,

against

DIVERSIFIED INDUSTRIES, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT

Question Presented

Whether in a breach of contract action, a plaintiff should receive anticipated profits from an assumed sale of unregistered "investment" shares which were delivered late, without proof of intent to sell, and with affirmative evidence of intent to retain the shares, ultimately delivered two months late.

Statement of Facts

The decision by the Second Circuit resulted from an appeal by Diversified Industries, Inc., the Respondent ("Diversified"), from a Judgment filed July 15, 1971 in favor of Aubrey Kaufman, the Petitioner ("Kaufman").

This was a dispute over the interpretation of a contract resulting in an action for breach, and the case was tried before a jury on the issue of liability. But the District Court ruled as a matter of law that the contract read as Kaufman contended. It restricted the jury's determination to the issue of estoppel, and the jury ruled in favor of Mr. Kaufman on such defense.

The case was then tried before the Court on the issue of damages, by stipulation of the parties. The District Court found damages of $100,759.95, but in so doing reversed its prior determination as to the meaning of the contract, holding that the contract read substantially as Diversified had contended on the issue of liability. The withdrawal of the issue of performance and breach from the jury, and the instructions on estoppel were the basis for Diversified seeking a new trial on appeal. In addition, the basis for fixing damages was in issue on the appeal.

The Court of Appeals upheld the District Court on the issue of liability, but reversed it on the computation of damages, reducing the damage award to $25,888.50. Diversified's essential argument was that Kaufman was improperly seeking the fruits of an unrealized speculation, and that his whole case for damages was essentially one of overreaching and afterthought. The Second Circuit unanimously agreed on the following facts placed before it.

This was an action arising under the law of New York, removed to the federal court on diversity of citizenship jurisdictional grounds, and New York law governs all the issues of the case.* Diversified, a listed corporation, entered into a contract dated May 9, 1968 with Kaufman and five other stockholders of Datatron Processing Inc.

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* For this reason alone, any alleged differences in results reached in other Circuits is irrelevant to this Petition, but as will be shown, there are no real differences in the Circuits on the issues herein.

("Datatron"), a New York corporation, operating in the data processing and mailing service field. The acquisition contract provided for the exchange of all of the issued and outstanding capital stock of Datatron solely for shares of common stock of Diversified. Kaufman owned 17½% of the outstanding shares of Datatron prior to the agreement and was to receive 17½% of the Diversified shares payable. The Diversified shares were payable to all six of Datatron's shareholders in an initial installment of 45,800 shares (approximately $1,250,000 in market value) as of May 9, 1968, and in a contingent installment thereafter, if Datatron's earnings increased in the year ending December 31, 1968. The first installment was paid at the closing of the agreement, and under the terms of the contract, Kaufman and other former stockholders of Datatron were entitled to receive shares of Diversified stock equal to four times the 1968 net income of Datatron (after taxes) in excess of $125,000. In accordance with that agreement and the 1968 net income statement of Datatron, Kaufman and other former stockholders of Datatron were entitled to receive shares of Diversified equal to a market value of $2,779,300. Kaufman's pro-rata share thereof was $486,377.50.

Under the contract (Sec. 3(c)(iii)) Diversified had to deliver shares payable within 30 days after receipt of the 1968 income statement of Datatron with written approval by the former Datatron shareholders. While Diversified had the income statement alone from and after April 3, 1969, receipt of such income statement with the shareholders' approval was acknowledged by Diversified on Monday, May 5, 1969. Thirty days later was June 4, 1969, which became the deadline date for delivery of the shares. Under the terms of the contract Kaufman was entitled to delivery on June 4 of 14,739 Diversified shares. This number of shares is computed by dividing the amount owed to Kaufman ($486,377.50) by the average price ($33 per share) of Diversified stock 20 (business) days prior to June 4, 1969, pursuant to the contract.

However, if Diversified delivered the shares owing to Kaufman earlier than June 4, that is, on May 5, 1969 as was contended by Diversified, then Kaufman was entitled to only 13,170 shares on such earlier delivery date. This number is computed, pursuant to the contract, by dividing the amount owed to Kaufman ($486,377.50) by the average price ($36.93 per share) of Diversified stock 20 days prior to May 5, 1969. Diversified contended that it made a good equitable and/or legal delivery of the required number of shares in accordance with the contract, by written confirmation on May 5, 1969, although the certificates for such shares were not delivered until several weeks later. The relevant clause of Section 3(c) of the contract states:

> "(iii) Diversified shall deliver additional shares payable hereunder within 30 days after receipt of the financial statement, together with written approval by Stockholders, from which it appears that the earnings of the Company and its subsidiaries were such as to require a payment of additional shares hereunder. The shares of Diversified Stock deliverable shall be deemed to have a then market value per share equal to the average closing price per share of Diversified Common Stock, on the Stock Exchange where it is traded, for the twenty day period next preceding delivery of the shares. The market value in shares payable shall be divided by the then market value per share of Diversified Stock for determining the number of shares deliverable to the Stockholders."

As held by both the District and Circuit Courts, the term "average closing price . . . for the twenty day period next preceding delivery" in the second sentence of the quoted clause, means the average of the closing prices of Diversified common stock on the American Stock Exchange for the twenty trading (i.e., business) days prior to the deadline date for delivery June 4, 1969, beginning May 6, and ending June 3, 1969. The word "delivery" in the quoted phrase

was interpreted to mean the day of promised delivery (i.e., June 4, 1969). This correct interpretation of the contract was not questioned by either party on the appeal, although Kaufman based his whole case for $230,000 in damages plus attorneys' fees of $100,000 on a contradictory interpretation of the clause which he made to the District Court throughout trial. The Second Circuit nevertheless analyzed such issue of interpretation carefully, and agreed with the reading of the contract which led Diversified to reject Kaufman's claims throughout.

Diversified also maintained that the quoted clause of the contract also permitted delivery *before* June 4, 1969, the day of latest promised delivery, by the words "deliver . . . within 30 days" in the first sentence. If such delivery was, as contended, made earlier than the deadline date of June 4, 1969, i.e., on Monday May 5, the average closing price for an earlier 20 day period, beginning April 7 and ending Friday, May 2, 1969, would have yielded the 13,170 shares which Diversified claimed was all of it owed Kaufman. Such shares were confirmed to him by letter dated May 5, 1969. This commitment was also acknowledged by Diversified in a listing application filed with the New York Stock Exchange on May 12, 1969.

Diversified did not make physical delivery of certificates for the shares on either May 5, or June 4, 1969. Diversified attempted to show that the certificates were not promptly furnished because it was running close to using up all of its authorized, but unissued, shares during this seven week period, as a result of other commitments to issue shares. Commitments had been made to service outstanding convertible debentures and acquisition contracts, and in pending negotiations to acquire other companies in exchange for shares, but a number of these commitments were modifiable. Diversified argued that it committed, i.e., equitably delivered, the shares on May 5, but because of these obligations it therafter delayed taking required steps

with the American Stock Exchange and its stock transfer agent to issue stock certificates to the former Datatron shareholders. They were not furnished to Kaufman (or the other former Datatron shareholders) until August 1, 1969, when certificates for a total of 75,258 shares, including Kaufman's 13,170, were delivered.

During this eleven week period from May 5, to August 1, 1969, Kaufman did not make any written or oral statement to Diversified concerning the delay in delivery of his share certificates. He joined in a transfer by gift of part of these shares to the Datatron accountant, witness Edelstein, on May 29, 1969. He was otherwise silent on the subject of his 13,170 committed shares and on any alleged right to receive additional shares. However, in June and July Kaufman did speak with former stockholders of Datatron on this subject, several of whom had continued as officers of Datatron. Late in July, 1969, Kaufman told Datatron officers that he believed the contract required that the number of shares had to be recomputed as of the date delivery of the certificates occurred. Kaufman said that he intended to bring suit for additional shares over the 13,170 committed, but that he would wait until "he got the stock in hand" before he took any action.* Kaufman's comments to witness Cear (president of Datatron) after July 21 were imputed to Diversified by the District Court, because Cear had become a director of Diversified on July 17, 1969. Cear did not, however, recall having related Kaufman's statements to Diversified.

On August 1, 1969, Kaufman accepted the certificates for 13,170 shares, acknowledging their receipt "as per agreement." But he also wrote a registered letter to Diversified stating his views directly for the first time, saying ". . . it is my understanding that the per share value was to be computed on an average price per share 20

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* 268a, Appendix in Circuit Court.

days preceding issuance of the shares . . . I believe Diversified . . . is in error." Kaufman steadfastly maintained such position that per share price should have been computed as of August 1, 1969, i.e., whenever delivery of the certificates actually occurred. Such position was maintained, and accepted by the District Court, until it entered judgment herein in his favor on an inconsistent theory, determining breach and computing per share price as of June 4, 1969, the "promised" delivery date.

On May 5, 1969 Diversified's market price was approximately $37 per share. The average price of Diversified common stock for the 20 trading days prior to the deadline date for delivery, June 4, 1969, had fallen to $33 per share. Between June 4, 1969 and August 1, 1969, the closing price of Diversified common stock on the American Stock Exchange fell from $33 per share to $21.63 per share.

The contract provided that the consideration to Kaufman was the delivery of shares of Diversified common stock. However, the shares were not registered under the Securities Act of 1933 and were subject to other restrictions, making them "letter stock." The District Court found after a lengthy hearing (without cross-appeal) that on June 4 and on August 1, 1969 (and *a fortiori* on May 5, 1969 as well), the value of the shares, as restricted by Section 11 of the contract, was 50% of the price of Diversified shares listed on the American Stock Exchange.

On these facts, Diversified denied the breach of contract claimed, and contended that it made a good equitable delivery of the correct number of shares, as of May 5, 1969. The District Court rejected the contention of no breach, excluding such issue from trial or determination by the jury, and denied a motion for a new trial. The Circuit Court affirmed that portion of the District Court's conclusions, and such issue is closed.

Diversified further contended that assuming, *arguendo*, it did breach the contract on June 4, 1969, Kaufman may

have thereby been entitled to 14,739 shares, but Kaufman was silent until August 1 and then accepted 13,170 shares. Diversified argued that Kaufman had not suffered any recoverable damages from the late delivery of such shares, having shown no intent or effort to liquidate them during the period. Thus, his only claim was for the value of the 1,569 restricted shares that were never delivered, and with the applicable discount for this "letter stock," Kaufman's actual damages were limited to $25,888.50. But the District Court awarded damages for the delay in delivery of the 13,170 shares, by giving credit to Diversified only for the reduced market value of such shares as of the August 1 date they were accepted. The amount of damages was the second major issue of the appeal. The Circuit Court reversed on this issue, and held that Kaufman failed to prove any right to damages beyond the conceded $25,888.50. His award of attorneys' fees under the contract, based on the magnitude of his recovery, was remanded for reconsideration by the District Court.

The calendar of events herein is summarized:

May 5, 1969—Sending of Diversified commitment letter to Kaufman and other former Datatron stockholders.

May 12, 1969—Commitment of May 5 acknowledged in Diversified filing with New York Stock Exchange.

May 14, 1969—Kaufman's receipt of a copy of May 5 letter from Diversified covering his 13,170 shares.

May 29, 1969—Kaufman joins in assignment of a portion of such shares.

June 4, 1969—Delivery date required by the contract and breach date for purposes of this action, as ultimately found below.

Entire prior period through July 31, 1969—Kaufman says nothing to Diversified as to any claim of breach.

July 21 to July 26, 1969—Kaufman speaks to Cear (a Diversified director as of July 17) and says he thinks he

will be entitled to more shares, because under the contract computation should be made as of the 20 days before delivery of the certificates. Kaufman says he will wait until he has the stock in hand before he takes any action. Cear does not recall reporting these statements to Diversified.

August 1, 1969—Kaufman receives the 13,170 shares certificates and signs a document which says: "This will acknowledge receipt . . . as per agreement."

August 1, 1969—Kaufman sends a registered letter stating: "I hereby acknowledge receipt of 13,170 shares of Diversified Metals Corporation stock. However, it is my understanding that the per share value was to be computed on an average price per share 20 days preceding issuance of the shares. Please examine your records as I believe Diversified Metals Corporation is in error."

September 24, 1969 –Kaufman sues for $230,000 in money damages plus $100,000 in attorneys' fees, based on his theory of the contract requiring an August 1 computation.

The foregoing calendar of relevant events is referred to at several places in the Argument.

Reasons for Denying the Writ

The decision of the Second Circuit is neither new law nor in conflict with other Circuits. It merely applies ancient principles of the law of contract damages to a set of facts which reflected monetary injury of no more than 10% of the plaintiff's exaggerated and unwarranted claims from breach of contract. The decision was based on undisputed facts and not novel principles of damages, and Certiorari is not required here to do substantial justice to Petitioner nor to restate any principles of law relied upon by the Second Circuit.

Petitioner's Damages Were Properly Limited to the Value of the 1,569 Shares of Unregistered Stock Which Were Not Delivered, i.e., $25,888.50

A. ***There Was No Proof Of Damages From The Alleged Breach.*** The District Court determined that Diversified breached the contract on June 4, 1969, but such determination represented the first time that Kaufman had been made the subject of a contract breach on June 4, 1969. The determination below (after testimony was closed on liability and on damages) was a retroactive application of the ruling principles of law to this contract. But until the appeal Kaufman never claimed or proved any damages for late delivery of his 13,170 shares. He failed in his burden of proof on damages, and the record below was absolutely barren on such point. No testimony was ever presented by Kaufman on his alleged damages for late delivery. There was no evidence, other than a conceded market drop, to support the District Court's finding of an actual "loss" to Kaufman as to the 13,170 shares. The evidence was directly contrary to such finding of damages, and the Circuit Court determined such was the case on a most complete record.

(i) *Waiver.* The calendar of events above shows that Diversified delivered certificates for the 13,170 shares on August 1, 1969. Having accepted specific performance to that extent, could Mr. Kaufman then complain of damages for delay in delivering the shares he received "as per agreement"? While as an abstract legal issue, it was concluded after trial that the breach occurred on June 4, 1969 with respect to damages, partial specific performance was tendered and delivery accepted by Kaufman on August 1, 1969. His only claim in pleadings and at trial two years later was that the computation of the number of shares was in error and that he was entitled to more shares. The District Court ultimately dismissed his claim for faulty computation, deeming it amended after trial to state a

claim for delayed delivery (without expressly so stating), but Kaufman himself did not make a delayed delivery claim until the appeal. On the appeal, he accepted what had seemed error to him below and urged damages solely from delayed delivery in order to hold on to his money judgment. Kaufman did not waive his right to 1,569 more shares as of June 4 which were never delivered and waiver is not urged as a complete defense to liability herein. But Kaufman accepted the partial remedy of specific performance on August 1, 1969 and cannot now claim damages as to the 13,170 shares he accepted.

See *Franck* v. *J. J. Sugarman-Rudolph Co.*, 251 p. 2d 949, 953 (S. Ct. Calif., 1952) and 5A *Corbin on Contracts* §1245, p. 577 on the settled principle that a claim for damages can be discharged by voluntary acceptance of a defective performance, provided there is evidence of assent to the partial performance. A person suffering from breach of contract may elect to accept, and a court may decree partial specific performance, to the extent of the vendor's ability to comply with the other terms of the agreement. *Feldman* v. *Lisansky*, 239 N.Y. 81 (1924); *Prilik* v. *Goodman*, 111 N.Y.S. 2d 916, 918 (S. Ct., Kings 1952); *Itzkowitz* v. *Fertitla*, 76 N.Y.S. 2d 156 (S. Ct., Kings, 1947). Partial specific performance is a well-recognized remedy in equity. *Warren* v. *Hoch*, 96 N.Y.S. 2d 832 (A.D. 2d, 1950); *Big State Barging Co.* v. *Calmes*, 138 F.Supp. 891 (E.D. La., 1956).

If Kaufman had a remedy in damages on June 4, 1969 and he accepted a partial specific performance on August 1, should a court two years later have upset that binding step taken by him? If he wished to protect his right to sue solely for money damages, he had his remedy. He should have refused the 13,170 share certificates and promptly sued for money damages. But instead, he accepted the partial specific performance, a block of unregistered shares, and even assigned a portion thereof. Should the District Court have undone that completed,

voluntary act, undertaken by Kaufman with complete knowledge of his rights?

> "Where a contract is broken in the course of performance, the injured party has a choice presented to him of continuing the contract or of refusing to go on . . . the plaintiff cannot thereafter elect to foreclose its mortgage for a default which apparently it chose to disregard as a ground for termination of the contract." *Emigrant Industrial Savings Bank* v. *Willow Builders,* 290 N.Y. 133, 144 (1943, Ch. J. Lehman).

A basic principle applies here: "Acceptance of benefits under the contract with knowledge of the wrong constitutes a waiver of the wrong." *New York Tel. Co.* v. *Jamestown Tel. Co.,* 282 N.Y. 298, 372 (1940). While New York law governs this case, the principles involved are fundamental to the law of every state, are neither new nor unique and do not reflect any division in the Circuits or between the several states.

(ii) *Speculative Gain.* The damages awarded by the District Court were pure speculation, and in spite of Kaufman's claim of "new law", should not be reinstated. Kaufman's contract said: "The shares of Diversified Stock being delivered pursuant to Section 1(b) hereof shall be acquired and held by the Stockholders for investment, and not with the intention of any transfer thereof, by sale, gift or otherwise." Such investment representation was necessary for compliance with the Securities Act of 1933 in the issuance of unregistered shares. Kaufman himself said late in July, 1969 that he would not take any action to enforce his alleged rights to shares or damages until he "got the stock in hand." In order to award damages for delay in delivery from June 4 to August 1, 1969, the District Court necessarily concluded that Kaufman changed his recited investment intention just one year after he

entered into the contract in 1968, and was in fact ready and willing to sell on June 4, 1969. There was no evidence of any such change of investment intention in the record and no basis to surmise it. "Where damages are deemed speculative, recovery will be denied on the basis of pre-Code principles which . . . continue in force." *2 Anderson on the Uniform Commercial Code*, p. 770; see *Plastic Products Corp.* v. *Filtrol Corp.*, 137 F. Supp. 401, 407 (N.D. Okla., 1955). See *Smith* v. *Bolles*, 132 U.S. 125 (1889) and *Estate Counseling Service* v. *Merrill, Lynch, Pierce, etc.*, 303 F.2d 527, 532 (10th Cir. 1962), denying recovery even in securities fraud and other intentional tort situations, for the fruits of an unrealized speculation.

There is no evidence of any attempt by Kaufman to sell the 13,170 shares or any of his other 6,015 unregistered Diversified shares during the relevant seven-week period (although he took definitive action to sell 2,000 shares just a few months before this dispute arose). The District Court correctly fixed a value as of breach date for 1,569 unregistered shares never delivered, but it erred in fixing a value for the possibility of sale of 13,170 other shares, without proof of any attempt or intent by Kaufman to liquidate this "letter stock." Normally the damages for delay in delivering property or wrongfully depriving someone of possession are interest on the value of the property for the number of days of deprivation. See *In re Jones Will*, 227 N.Y.S.2d 486 (A.D.2d, 1962). It was a Draconian result in the District Court to hold Diversified liable for the whole drop in value of Kaufman's shares during this seven weeks, with no showing of readiness, willingness or ability, i.e., a contract or at least an offer, to sell them at any specific figure. The District Court erroneously assumed a loss merely because the paper value of an undelivered commodity went down, but a loss recognizable at law does not automatically follow from such fact. Thus, the Circuit properly reversed, saying "It cannot be assumed that resale would have followed in the normal course of

events." Petition for Writ, Appendix A (hereinafter referred to as "Pet. App. A [or B]"), 11a.

In the famous case of *Western Union* v. *Hall,* 124 U.S. 479 (1888) the Supreme Court held that speculative damages for an assumed stock market transaction that did not occur, because a telegram was sent a day late, could not be awarded. Such principle negates awarding Kaufman $75,000 because he might have sold the 13,170 shares between June 4 and August 1, 1969 if he had the certificates. Under the erroneous District Court holding and his present Petition, Mr. Kaufman would do better than any other Datatron shareholders receiving unregistered stock in Diversified during a period of market drop. He would convert paper value to cash, and earn a substantial capital gain, without showing any intent, any effort or any contract to sell his 13,170 restricted shares. The anomaly of his position is highlighted by the fact that he still had the shares two years later during trial, and was still able to realize speculative gain thereon while he was claiming monetary damages for an assumed sale in June, 1969. Contrary to established damage principles in all our courts, Kaufman's position would thus have been improved by the breach of contract. See *Hughes Tool Co.* v. *United Artists Corp.,* 110 N.Y.S. 2d 383, 385 (A.D. 1st, 1952).

The Datatron stockholders further considered the incentive shares, payable for a one year earnings increase over $125,000 to be pure profit, after having sold their company outright for the first installment in shares. They themselves described the incentive shares as the "Come arrangement,"* i.e., hoped-for profit in a game of chance. Any realization of cash on these contingent shares in 1969 was profit to these shareholders, for income tax and any other purposes. Kaufman would also be assumed to have liquidated his shares on the very day he was to receive them, June 4, not any of the other 50-odd days until

* 74a, 113a, Appendix in Circuit Court.

August 1, when the market price was lower on nearly each succeeding day. Notwithstanding a contract that fixed per share values by an average over a 20-day testing period, he would be given the prescience, without proof, of having sold out when the market was at its highest, on the first day of the seven-week delay. *Baker* v. *Drake,* 53 N.Y. 211, 215, denied damages for similar "supernatural powers of prescience" back in 1873. In the *Western Union* case, at p. 484, the Supreme Court said, ". . . If the order had been promptly delivered on the day it was sent, and had been executed on that day, *it is not found that he would have resold the next day at the advance* nor that he would have resold at a profit at any subsequent day . . ." [emphasis supplied]. Kaufman's mere *chance* to sell and retain paper profits, is no more compensable than the lost chance to sell in *Western Union* v. *Hall, supra.*

The Circuit Court's comments in distinguishing *Richard* v. *American Union Bank,* 253 N.Y. 166 (1930) are a complete answer to Kaufman's reliance thereon in his Petition. See Pet. App. A, 11a, Circuit Court discussion. In essence, a currency trader's announced intention to resell Rumanian money in the *Richard* case is not the same as a private individual waiting for unregistered shares deliverable under an acquisition contract. Kaufman is different from the claimant in *Richard* because Kaufman did not state any intent to resell at the time of contracting or thereafter, even through partial delivery and prosecution of an action for two years, seeking damages on a totally different claim for faulty computation.*

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* *Spitz* v. *Lesser,* 302 N.Y. 490 (1951) relied on by Petitioner did not involve valuation of a fluctuating commodity with a ready market for resale. The *Spitz* case dealt with a minimum royalty contract for producing toys, where the defendant did not go into production, and the plaintiff's sole basis for showing damages were the prescribed minimum royalties in the contract. Since the minimum royalties in the contract were the only damages plain-

(footnote continued on following page)

The reason Mr. Kaufman never made a claim or proof of damages from delayed delivery, from 1969 until after he obtained the District Court judgment and sought to sustain it on appeal, is readily inferred—he knew he was not actually damaged. This was the motivation for his unsupportable theory of the contract, that computation was open-end until actual delivery of certificates, unsuccessfully urged upon his fellow stockholders Cear and Ingenito who refused to sue. Kaufman thought his recomputation thesis was his only basis for a dollar recovery herein, since he could not prove any actual damages. During the relevant seven weeks' delay, he had no contract to resell his shares and no intent to sell them. Kaufman had asked Diversified to buy back 2,000 shares from him (so it could avoid the expense of registering them under the 1933 Act for public sale) months before this dispute arose, and such transaction closed April 29, 1969, showing one method of selling if he desired it. He made no other effort or request to Diversified to buy his shares, nor to register them under the Securities Act of 1933 for sale to others in accordance with his three-year contractual registration rights. To the contrary, the record shows a motive and intent by Kaufman to retain all remaining shares *after* June 4, because the Datatron spin-off dividend, announced in June, was payable on a share-for-share basis only to stockholders of record existing as of August 12, 1969. This crucial fact was emphasized by the Circuit Court (Pet. App. A, 12a-13a, ftn. 8); "The undisputed evidence indicates Kaufman was desirous of maintaining a position in

(footnote continued from preceding page)

tiff could prove, the Court merely affirmed the principle that since some damage was evident, the difficulty in exact proof should not prevent a rough approximation thereof, and the minimum royalty could serve as such approximation of damages. In the instant case, the Second Circuit has held, in effect, that substantial damages to Kaufman which were proximately caused by Diversified's seven weeks' delay in delivering 13,170 shares were not automatically evident.

Diversified stock. . . . Thus, an award of damages for late delivery would simply present Kaufman with a windfall." The evidence, particularly in the anticipated spin-off of shares of Datatron to all Diversified stockholders on August 12, 1969 (on a share-for-share basis) gave Mr. Kaufman a strong motive for retaining the shares and not selling them during the relevant period. Datatron was a company Mr. Kaufman had started as an initial founder, it was going public on its own in August, 1969, and all the former stockholders were looking forward to a new opportunity for speculative gain in its separate trading in the market place. If there was any company Mr. Kaufman knew, it was Datatron, and if there was any block of shares he wished to hold for investment, it was the anticipated spin-off dividend of some 20,000 shares of Datatron stock. He could only obtain these dividend shares by holding on to his Diversified shares past August 12, the record date for determining shareholders entitled to the dividend. In fact, he held the Diversified shares through the trial in 1971, notwithstanding the right to sell them privately and to demand registration under the 1933 Act for public sale. The delay in delivery of certificates for seven weeks in 1969 was, at best, a breach without substantive injury and required the conclusion reached by the Circuit Court.

Petitioner's attempt to show some division in the Circuits on the applicable rule of damages herein falls short of the mark. *Slaughter* v. *Philadelphia National Bank,* 290 F. Supp. 234 (E.D. Pa. 1968), which was reversed at 417 F. 2d 21 (3rd Cir. 1968), is cited by Petitioner, but such decision involves only a question of valuing shares in a closely held corporation, where the defendant contended that the absence of a market, automatically precluded the claimant from proving any damage because of the inability to value the wrongfully retained shares. Such decision has no relevance to the instant case, where market value was a determined fact, and where Kaufman had the option to sell readily available to him, if he really wanted to

sell during the seven-week period. Petitioner further cited *Southern Materials Co.* v. *Bryan Rock & Sand Co.*, 308 F. 2d 414 (4th Cir. 1960), which does not involve the issue in the instant case, because the Court there stated that the evidence showed there had not been much change in the price of gravel between the date when it should have been delivered and the date of trial. The *Southern Materials* case did not involve a commodity of fluctuating value, and the language in the case relied upon by Petitioner, does not support the mechanical rule of damages which Kaufman advances. The decision merely rejects an offset to damages which might have resulted from delivery and storage expenses for the undelivered gravel, if incurred. The Fourth Circuit merely refused to recognize what the complainant might have spent or might have done, as a defense to damages. In the instant case, the Second Circuit held Kaufman accountable for what he did during a crucial period of market downturn—which was to retain his shares and to speak and act as if he had no other intention.

(iii) *Depreciating the Value of Specific Performance.* The District Court erroneously stated in support of a finding of loss without proof that "it merely values the loss caused by the breach by the amount which plaintiff would have received had defendant fully performed" (Pet. App. B, 31a). This statement which Petitioner now relies on as the proper principle herein, cannot, however, withstand further analysis, for "the amount . . . had defendant fully performed" was *not* an amount. It was a block of 13,170 unregistered shares. Elsewhere the District Court opinion rightly states that "Plaintiff bargained for payment in the form of stock, not cash" (Pet. App. B, 30a). The District Court fixed damages by taking the depreciated value on August 1, of specific performance on June 4. It erroneously mixed two different concepts. Specific performance could not after it occurred be given a money value; it had only a performance value. *In re Carter's Claim,* 134

Atl. 2d 908, 913 (S. Ct. Pa., 1957), states this principle:

> "If A promises to deliver B 1300 shares of A Co. stock but delivers only 1200 shares there is no injustice in allowing B to take the 1200 and sue for damages. But if A promises to deliver 1300 shares at a certain price, and B promises to pay a certain price for them, but the contract provides that B need not perform if the market is lower than the sale price on the delivery date, there is no basis in law or justice in allowing B to take the shares and sue for the difference between sale price and market price. This is precisely the situation before me, and nothing in the Sales Act, the Uniform Commercial Code, or any of the cases cited lead to a different result from that which I have reached."

The principle is stated in the context of comparing a warranty with a condition to closing an acquisition contract, but applies equally herein. If Kaufman had a right to an "amount" on June 4, and Diversified handed him bonds in that amount, or any other commodity, Kaufman did not have to accept it. The law gave him the right to money, once a breach was established, and he could have rejected unregistered shares. Payment of money became a condition to the closing out of his contract. Can he waive that condition by accepting a commodity on August 1, 1969, then unilaterally value the commodity at $75,000 less than it was worth seven weeks earlier? If the stock had gone up, could Diversified have satisfied its breach of contract by delivering fewer shares? Either approach would take a voluntary agreement of the parties, not an act by the District Court two years later, to revalue the commodity accepted. See the New York rule, which controls, in *Fiorito* v. *Yaskulski*, 228 N.Y.S. 2d 598 (A.D. 4th, 1962), holding that when specific performance is being decreed, the court cannot rewrite the parties' contract. The party in breach therein was directed by the lower court to pay in

cash at the closing, but the New York Appellate Division held that the contract entitled him to deliver a second mortgage and obtain a deferred pay-out, and that the decree of specific performance must be so revised. *Accord: Robert S. Smith Corp.* v. *Krausharr,* 292 N.Y.S. 410 (A.D. 2d 1936). Full credit is normally given for partial performance of a contract to deliver a specified number of a commodity. See *Consol, Mounting, etc.* v. *Robert Teller, etc.,* 170 N.Y.S. 2d 2, 4 (A.D. 1st 1957).

The Circuit Court was careful to point out (Pet. App. 12a, ftn. 8) that it was not, in any event, penalizing Kaufman for accepting the shares delivered late, since he could have bought no more than 10,047 registered shares with the amount of money receivable on his damage claim even at the low price on August 1, and instead received 13,170 shares by accepting partial performance. Kaufman's Petition (at p. 10, ftn. **) attacks this reasoning by saying the 13,170 unregistered shares accepted were still worth much less than 10,047 registered shares obtainable in the market on that date. Notwithstanding Kaufman's assertion that "this obvious error in the court's analysis is at the heart of its decision," the Circuit Court footnote (a long way from the heart of the decision) states that the value of 13,170 "unregistered shares would soon approach the open market price" because of Kaufman's 1968 contractual rights to registration under the 1933 Act. (Pet. App. A, 12a, ftn. 8). The heart of this footnote is the conclusion that Kaufman wanted to obtain and retain all the shares he could get, and was not interested in money damages on August 1, 1969.

The shifting and inconsistent positions of Petitioner on the damage issue may have accounted for the erroneous result in the District Court which the Circuit Court had to correct when it examined the bottom line of Kaufman's behavior—no sale and no intent to sell. The damage trial started after a District Court determination of breach, and a jury determination of no estoppel that occupied two

weeks of trial time. Kaufman then went forward to demand the market value of 7,767 additional shares as of August 1—$180,000 plus another $50,000 for the value of Datatron shares receivable in an announced spin-off distribution effective after August 1.* However, market value of the base claim on August 1 was only $165,000 and testimony was showing that unregistered shares were worth only 50% of such amount. Kaufman made no attempt to prove actual damages, relying solely on his contract theory, and trial time on the ultimate issue of the case was spent almost exclusively on the valuation of unregistered shares. Facing a recovery on a $230,000 claim reduced to $82,500, Kaufman sought to change his ground. He asked to amend his pleadings, after trial of the damage issue was virtually complete, to seek specific performance as of August 1, 1969, which would have yielded about $109,000 in commodity value, with the shares probably free under the 1933 Act because two years had gone by. The District Court properly refused to allow this belated shift from damages to specific performance. Then Petitioner made his next shift in position, arguing that June 4 was the breach date, and that his claim to 7,767 additional shares should be valued at the higher price ($33) on such earlier date; thus, even with a 50% discount for unregistered shares, he could still net $138,000. But as cases without substance often end up, he became entrapped in the logical implications of his new approach. A June 4 breach date required a computation of shares at this value on such date, yielding only 14,739 due, and Diversified was still entitled to full credit for the 13,170 shares delivered. The maximum recoverable damage on his $230,000 claim became only $25,888.50. At that point, Kaufman's counsel went back to his first position,

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* This manifestly improper $50,000 claim seeking payment twice for the same Datatron shares, whose future value was part of the parent company's stock value during the relevant period, was denied in Finding 12 by the District Court, without cross-appeal (Pet. App. B, 19a).

arguing for an August 1 breach date and seeking the value of 7,767 additional shares on such date. Diversified urged June 4 as breach date because, while it claimed full performance on May 5, the District Court had already rejected the contention of equitable delivery. Diversified's outside date for performance and the governing breach date, therefore, was June 4, 1969.

The District Court accepted the June 4 concept at that point, upsetting the whole logical superstructure of its findings on liability in the process, and correctly held that if there was a breach, it occurred on June 4 and shares deliverable had to be computed as of such date. But at that point weeks of judicial effort had elapsed on a claim that had all but evaporated, and Kaufman was still contending that computation had to be made as of August 1 because the contract clause 3(c) (iii) was "open-end." The District Court then, on its own motion, determined that Diversified should not get credit for delivering 13,170 out of 14,739 due, but only credit for the *depreciated cash value* of 13,170 shares on August 1. Finding 13 (Pet. App. B, 19a) thus gave a result to Mr. Kaufman neither prayed for nor proven, with interest and contractual attorney's fees based on the $100,759.95 windfall.

The concept of a depreciated value for specific performance applied by the District Court and resubmitted by Kaufman on his Petition herein is erroneous, and assumed a loss without any testimony as to actual damages, and in the face of definitive evidence of waiver and of no actual loss. By a June 4 breach date, full specific performance was 14,739 shares, and if Kaufman, in the words of the District Court "accepted as partial performance 13,170 shares" (Pet. App. B, 31a), the District Court should not have revalued them at an assumed cash equivalent. The shares were not given in lieu of cash at some agreed value; they were given and accepted as shares. This factual essence in the reversal of the District Court cannot be over-

looked in evaluating the result reached by a unanimous Court of Appeals.

Diversified advanced two other contentions requiring reversal which the Circuit Court did not apparently reach.* Kaufman's Petition re-opens these issues and the following sets forth two additional reasons why reversal of the District Court was required.

B. ***Kaufman had a Duty to, And Failed to, Mitigate Any Damages From Later Delivery.*** The undisputed facts (see timetable) showed that Kaufman took no steps from May 5, 1969 through August 1, 1969 to mitigate his money damages from delayed delivery of his share certificates, notwithstanding a steadily falling market in Diversified shares throughout such period, going down from $36.93 in May to $33 on June 4 and down to $21.63 per share on August 1, 1969. There is no dispute over the fact that Kaufman did not sell any shares, either outright or by short sales (delivering borrowed shares), to fix his price and resulting profit on the 13,170 Diversified shares committed to him. He also did not notify Diversified of his claim directly until August 1 (he notified a director, Cear, after July 21), so that Diversified could take steps to hedge in the open market or otherwise reduce the parties' damages by prompt delivery. Kaufman's failure to take any of the available steps to minimize his losses is an ultimate fact not in dispute. The sole issue is whether he had a duty to mitigate damages for the delay in delivery of his 13,170 shares. The Circuit Court did not need to reach this issue because of its conclusion that damages in this factual context required Kaufman to fulfill a burden of proof of intent to sell, but Petitioner's insistence on attempting to reinstate the erroneous District Court decision

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* The opinion, Pet. App. A. 14a, mentioned at the end "we have examined the other arguments of the parties, but find them to be without merit."

requires analysis of this third defect in its reasoning. Petitioner is now urging that a conversion rule of damages should be applied herein, i.e., damages for the highest value attained during a period of wrongful deprivation of property (Pet. App. 17). But this principle brings into application the settled limitation on such rule—the duty to mitigate damages within a reasonable time after knowledge of the wrongful appropriation.

The District Court dealt with the mitigation of damages issue in terms of the recognized common law duty that required an aggrieved buyer to purchase goods in lieu of undelivered goods, citing *Parsons* v. *Sutton*, 66 N.Y. 92 (1876). But then the District Court erroneously stated "there is no longer such an obligation," citing the U.C.C., Section 2-712(3) which gives the buyer of goods the optional remedy of "covering," but states that "Failure of the buyer to effect cover within this section does not bar him from any other remedy." New York U.C.C., Sec. 2-712(3), (McKinney's, 1964) (Pet. App. B, 32a). The error in this holding is twofold—Kaufman should have mitigated his claim to money damages by selling shares, not by buying more; "covering" by buying would merely worsen his position in a falling market.* More fundamentally the U.C.C. has not changed the traditional rule requiring a plaintiff to minimize losses on a claim for money damages (whether from breach of contract or conversion) by any reasonable means.

(i) *The Common Law Rule.* The rule of *Parsons* v. *Sutton, supra,* has been repeated in New York many times.

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* Covering was relevant only if Kaufman wanted the shares themselves—then his remedy was buying at a reduced price in the market and suing only for his actual cost, or alternatively, accepting the specific performance as to 13,170 shares (which he did, see Point (A)(i) "Waiver.") and suing for the balance of 1,569 shares or their money value on June 4, which the Circuit Court awarded to him.

See *DaBiere* v. *Von Goeben*, 171 N.Y.S. 2d 933 (A.D. 3rd, 1958). The duty to mitigate damages for breach of contracts of which the "cover" rule is a part, is well stated in *Hamilton* v. *McPherson*, 28 N.Y. 72 (1863) holding that the party subject to injury from breach has "the active duty to make reasonable exertions to render the injury as light as possible . . . and if the injured party through negligence or willfulness allows the damages to be unnecessarily enhanced, the increased loss justly falls on him. See also *Losei Realty Corp.* v. *City of New York*, 254 N.Y. 41, 48 (1930) cited by Petitioner himself. Minimizing damages can require prompt selling as well as buying, *Waumbek Manuufacturing Co., Inc.* v. *Alfandri*, 187 N.Y.S. 439 (A.D. 1st, 1921). The stock conversion cases mentioned in *Gelb* v. *Zimet Brothers, Inc.*, 228 N.Y.S. 2d 111 (St. Ct., N.Y. 1962), also cited by Kaufman, required him to fix the price on his 13,170 fluctuating shares by sale in the open market on or before June 4, 1969.* In *Wright* v. *Bank of Metropolis*, 110 N.Y. 237, 246 (1888) cited by Petitioner, the New York Court of Appeals said:

> "This duty, it seems to me, is founded upon the general duty which one owes to another, who converts his property under an honest mistake, to render the resulting damage as light as it may be reasonably within its power to do. It is well said by Earl, J., in *Parsons* v. *Sutton*, 66 N.Y. 92, that 'the party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can. He must not by inattention, want of care or inexcusable negligence permit his damage to grow and then charge it all to the other party . . .'"

The plaintiff in *Wright* had fully paid for his shares, but through the broker's mistake, had not received the delivery

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* Kaufman's witness Walker testified as to the realistic availability of a short sale in August, 1969, and it was equally available in June (336a, Appendix, in Circuit Court).

thereof on demand. Kaufman bought and paid for hi shares when he entered into the contract in 1968, and al ready had a contractual right to at least the 13,170 shares even before Diversified's commitment letter of May 5, 1969 Thus the rule requiring Kaufman to mitigate his damages is plainly applicable to Kaufman and his now urging tha this was a case of conversion requires the application of the mitigation of damages principle that is an integral part o any such basis for damages. See also *Mayer* v. *Monzo*, 22 N.Y. 442, 446 (1917), and *Minor* v. *Beveridge*, 141 N.Y. 399 402 (1894). *Jones* v. *National Chautauqua County Bank* 74 N.Y.S. 2d 498, 505 (A.D., 4th, 1947), states that "the complainant must be vigilant to hold down or reduce his loss," when he charges wrongful deprivation of his shares

Kaufman should not recoup the loss in value between June 4 and August 1, 1969, when he knew he was to receive 13,170 fluctuating shares at least from May 14 onward (the date he received his copy of Diversified's letter of May 5 the contents of which were probably known to Kaufman on or about May 5). See timetable above. We submit that his reasonable time to sell ended with the three weeks be tween May 14 and June 4, because under Kaufman's theory of the contract expressed in his notice of breach, if the stock price was falling as it was ($36.93 to $33 between May 5 and June 4), there was no way he could not be claiming a right, by recomputation, to more shares, i.e., some sort of breach after May 5. The theory of the District Court awarding Kaufman damages herein for the delayed de- livery of 13,170 shares necessarily made him a "trader" in those shares able, presumably, to dispose of these shares as Diversified stock fell in value, and Petitioner is now strongly urging that the conversion rules apply herein. The essence of the erroneous District Court judgment was that Kaufman lost his chance to sell on or about June 4. But the law requires a trader to move promptly and Kauf- man had over three weeks before June 4 to sell up to 13,170 shares, either regular way (at the discount for "letter

stock") or by a short sale, and "fix his price on the descending market," thus escaping any money damages on the shares.* In *Gelb* v. *Zimet Brothers, Inc., supra,* the New York Court said:

> "In the instant case plaintiff learned of the wrongful sale of his stock on October 26, 1960 while he was in Hawaii. He returned to New York during the first week of November, 1960 . . . Although plaintiff conceded at the trial that he was financially able to purchase and pay for equivalent stock at the time of the conversion and at all times thereafter, he did not do so . . . the court is of the opinion that the reasonable time period applicable here expired prior to November 19, 1960. Plaintiff had ample time before that date to make arrangements to purchase the stock himself and to finance the transaction. To grant plaintiff a greater period of time would permit him to speculate on the future course of the market at defendant's expense . . ."

Kaufman too was an affluent and experienced businessman, who had already owned 8,015 Diversified shares (2,000 of which were were sold for cash shortly before the dispute arose) and 13,170 additional shares committed in writing ($700,000 in this single holding alone), and was well able to protect himself against losses by open market actions.

Kaufman's duty to sell has been restated forcefully under the latest decision on the subject in New York, *Tangorra* v. *Hagan Investing Corporation,* 327 N.Y.S. 2d 131 (A.D. 4th, 1971), where a brokerage customer placed an order to buy shares, the broker acquired the shares, and the broker then sent a written confirmation to the

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* Kaufman could cover any short sale without investing any money by delivering the Diversified certificates furnished on August 1. See testimony of his broker-witness Walker, 335a, Appendix in Circuit Court.

stockholder. The purchaser paid for the stock, but thereafter there were delays in the mailing of a stock certificate, because the stock certificates were in other names and had to be put through the transfer agent for the new certificates to be prepared. From December 19, 1969, when the customer's order was placed and the securities confirmed to her, until February 21, 1970, when the certificates were finally sent to the customer, two months elapsed, and during these two months the shares became valueless in the open market. The purchaser sued the broker to rescind the transfer, but did not allege that she tried to sell the shares that had been confirmed to her. The brokerage firm moved to dismiss the complaint, because the purchaser had failed to mitigate damages, and the losses sustained were the result of her own inaction. The 4th Department held that the complaint should have been dismissed on such grounds. The case is on all fours with the conduct of Mr. Kaufman in the instant situation, and the language of the New York Appellate Division, is as follows:

> "Defendants' motions to dismiss the plaintiff's complaint against them should have been granted. It has long been recognized that when a broker purchases stock on behalf of a customer, title to that stock immediately vests in the purchaser. (Baker v. Drake, 53 N.Y. 211; LeMarchant v. Moore, 150 N.Y. 209, 44 N.E. 770, and Uniform Commercial Code, § 8-313.) Thus, on the day plaintiff ordered the stock and Hagan purchased it for her, she became its owner. Since the plaintiff was the owner of the stock from the moment it was purchased by Hagan for her account, she had the power to sell it, even though she had not received delivery of the stock certificate (Broderick v. Alexander, 268 N.Y. 306, 197 N.E. 291). Any loss plaintiff sustained was the result of her own inaction. Consequently, having no basis for recovery, the defendants' motions should have been granted (Foley v. D'Agostino, 21 A.D. 2d 60, 248 N.Y.S. 2d 121)."

The principles underlying the above-cited case are clearly spelled out in Diversified's brief to the Circuit Court charging Kaufman with a duty to sell in the declining market. The distinction between legal ownership of shares and mere possession or lack thereof of the certificate for the shares is fundamental, and is recognized in many of the New York cases. *Parsons* v. *Lipe*, 286 N.Y.S. 60, 86, 91, *aff'd.* 269 N.Y. 630 (1936); *Burt* v. *Wilcox*, 22 N.Y. 551, 556 (1860); *Wills* v. *Investors Bankstocks Corp.*, 257 N.Y. 451, 460 (1931).

Mr. Kaufman contended below that Diversified changed its position on the nature of Mr. Kaufman's duty to mitigate damages during the period May 14, 1969 through August 1, 1969 when Diversified shares were steadily declining, as between its argument in the District Court and in the Circuit Court, on whether buying or selling was Kaufman's appropriate step to mitigating damages. Mr. Kaufman's own lack of definiteness as to what he really wanted (other than "something more"), created the difficulty as to what was the proper technique for mitigating damages during this crucial period, when the price of Diversified shares was steadily falling in the open market.

The contract required delivery of shares, and if we take Mr. Kaufman's written claim to more shares made on August 1, 1969, then his remedy was plainly to buy these shares in the open market at their reduced price and thereby cover his wish to have additional shares. But if we go to the commercial essence of his dispute, Mr. Kaufman wanted the money value of the undelivered shares, not the shares themselves, and made a claim for money damages when he filed his complaint in September 1969. Taking that as his real objective throughout, selling in the open market was his only remedy to minimize losses from the fall in value of the undelivered shares. Mr. Kaufman was precisely in the same position as the plaintiff in *Tangorra* v. *Hagan Investing Corporation, supra,* and so argued,

inferentially, when he called witness Walker, a broker, t testify as to how easily Mr. Kaufman could have fixed hi price on the Diversified shares in June, when the marke was higher, by a short sale. Diversified consistently urge the availability of short sale in its motion for new tria in the District Court, and to the Circuit Court.

The only response Mr. Kaufman made to his conceded ability to sell shares regular way, or sell them short, wa to state the difficulties of putting up margin, and the inter est charges to be incurred. Obviously, any interest charge incurred in mitigating damages would be an item of re coverable damage in a proper suit on a delayed deliver claim. As to the problems in putting up margin, Mr. Kauf man's own witness Walker was very affirmative on th ease with which Mr. Kaufman could borrow the stock t deliver against a short sale. Mr. Kaufman's substantia holdings of Diversified stock alone gave him the necessar borrowing strength.

Mr. Kaufman's contentions on this point further sough to preserve his speculative options between June 4, 196 and August 1, 1969, when the law clearly precludes retain ing such options. The whole idea of the duty to mitigat damages in the open market on a fluctuating commodity i that a claimant has a reasonable time to take appropriat market action to stop the damages from running, and afte that reasonable time has passed, any further damages ar incurred for his own account. The principles of *Gelb* v *Zimet Brothers, Inc., supra,* were not distinguished b Mr. Kaufman in his brief in the Circuit Court. Instead Mr. Kaufman stated it would be imposing a burden "o plaintiff to have given up the opportunity to share in an increase in the market value of the stock" (p. 28, Kauf man's brief to the Circuit Court). Mr. Kaufman is sti arguing the exact opposite of what the law provides i these circumstances.

(ii) *Application of the Uniform Commercial Code.* The District Court accepted the common law principle, but rested its decision which Petitioner seeks to reinstate on Section 2-712(3) of the Uniform Commercial Code ("U.C.C.") having allegedly superseded Kaufman's common law obligation to mitigate damages. *In re Carter's Claim, supra,* is directly contrary to the conclusion of the District Court. The Supreme Court of Pennsylvania therein held that Section 2 of the U.C.C. did not apply to an acquisition contract involving transfer of investment securities. The Court in Pennsylvania (which has had the U.C.C. for many years longer that New York) concluded that in Section 2-105(1) defining the word "goods", the U.C.C. expressly *excluded* transactions in investment securities from coverage of the whole section on sales. Section 2-105, U.C.C. may have invited use of the principles of Section 2 when it was "sensible" to apply them by analogy, but such analogy was not justified, held the Court, in a situation involving a remedy for breach of a corporate acquisition contract (similar to the one herein) involving purchase of investment securities. *In re Carter's Claim, supra,* states a principle which is equally sound under New York law, notwithstanding occasional New York decisions which apply Section 2, U.C.C. to securities when it was "sensible". See *Hunt Foods* v. *Doliner,* 270 N.Y.S. 2d 837 (A.D. 1st, 1966) and *Silverman* v. *Alcoa Plaza Associates,* 323 N.Y.S. 2d 39 (A.D. 1st, 1971). In the instant case, where the equitable behavior of two parties to a genuine dispute on contract interpretation is the central issue, analogy to the strict rules of a sale of goods situation, where principles of commercial certainty may sometimes be more important than fairness, is misplaced. The common law of contracts and its ancient principle requiring a plaintiff to minimize his losses is more "sensible" here than the law of sales. Significantly, Kaufman's counsel also urged in the District Court that Article 2 of the U.C.C. does not apply to the instant transaction involving investment securities. Thus,

the District Court's application of a portion of the U.C.C. to the mitigation of damages defense herein was misplaced, and the substantial common law authorities cited (and accepted by the District Court) continued to apply to Kaufman herein.

(iii) *The U.C.C. Did Not Overrule the Duty to Mitigate Damages Herein.* In concluding that Kaufman no longer had an obligation to "cover", the District Court relied upon U.C.C. 2-712 which gives the buyer the remedy of "covering" in the open market, and states that "failure . . . to effect cover . . . does not bar him from any other remedy". (2-712(3) U.C.C., McKinney's, 1964). (The other remedy is damages under U.C.C. 2-713, and as will be shown, that remedy still implies a duty to mitigate damages by methods other than cover.) U.C.C. 2-712 is further explained in the Official Comment, putting this case in another damage category—consequential damages under 2-715, by saying (p. 645, McKinney's, 1964):

> "Subsection (3) expresses the policy that cover is not a mandatory remedy for the buyer. The buyer is always free to choose between cover and damages for non-delivery under the next section [2-713].
>
> "However, this subsection [2-712] must be read in conjunction with the section [2-715] *which limits the recovery of consequential damages to such as could not have been obviated by cover.*" [emphasis supplied]

The damage remedy of U.C.C. 2-713 applies to an executory contract for sale of goods when non-delivery of the goods occurs. But this is not a case of failure to deliver goods, but rather, of failure to make a payment (in shares) owed on June 4. The goods were delivered a year before when Diversified acquired Datatron. The "goods" in this contract, although nominally an exchange of shares, were the assets of a business, and the Diversified shares were the

currency used to buy the business. The District Court took the case outside the pale of commercial reality by treating the payment as if it were the goods. The primary claim of breach was one of contract interpretation, failure to compute the shares payable on a correct basis—Diversified computed as of May 5, Kaufman as of August 1, and the District Court concluded (without appeal by Kaufman) that computation was required as of June 4. Diversified was not even chargeable with late delivery until Kaufman's contention of an August 1 breach date was rejected by the District Court in favor of a June 4 breach date. The fall in value after June 4 of the shares deliverable was a consequence one step removed from the primary breach in failing to compute correctly, and the damage remedy of U.C.C. 2-713 for non-delivery of goods is plainly inapplicable to damages herein for a fall in value of currency, the 13,170 shares concededly owed. Such damages should be considered "consequential" damages under the U.C.C. (i.e., special damages rather than general damages) because they are not "out-of-pocket" and are a purely theoretical consequence of the primary breach, failure to compute on the correct date.* The breach here is outside the ambit of a commonplace failure of a seller to deliver goods on time.

U.C.C. 2-712 "must be read in conjunction with" Section 2-715(2)(a), which limits consequential damages to "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know *and which could not reasonably be prevented by cover . . .*" Official Comment 2 (p. 699, McKinney's, 1964) states that a liberal rule of consequential damages is followed, but the liberality of that rule is modified by refusing to permit recovery unless the buyer has at-

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*At best they are lost paper profits on a contingent share transaction, described by the recipients in speculative terms as a "Come arrangement" (113a, Appendix in Circuit Court).

tempted to minimize his damages in good faith either by cover *or otherwise.* Moreover the concept of mitigating damages remains very much a part of all sections of the U.C.C., and "a better appreciation . . . may be obtained if the starting point is placed in the general principles of the law of damages antedating the Code, rather than in the express provision of the Code." *2 Anderson on the U.C.C.*, p. 473. *Parsons* v. *Sutton, supra*, and its progeny has therefore *not* been overruled by the U.C.C., and Kaufman on his claim for consequential damages was clearly required to sell his 13,170 fluctuating shares of stock or otherwise mitigate his loss. See *Magnavox Co.* v. *Royson Engineering Co.*, 169 A. 2d 559 (Pa. Super., 1961) interpreting the U.C.C. and holding that a buyer cannot recover from a seller for consequences that reasonably could have been avoided by the buyer. Setting aside "cover" as a requirement, damages for primary breach as granted below, even under U.C.C. 2-713 still required reasonable exertions, other than "cover", to avoid compounding a loss. As shown, Kaufman knew from May 14, 1969 onward that he was to receive 13,170 shares valued at $36.93 per share, that the market was declining (reaching $33 by June 4) and that Kaufman was going to demand more shares or money damages under his theory of the contract. His subsequent loss between June 4 and August 1, when the stock reached $21.63 per share was not a loss cognizable by the law of damages, because it was easily and reasonably preventable in the open market for at least three weeks prior to this period.

Kaufman's own briefs and testimony on damages to the District Court, on the issue of the percentage discount for unregistered shares, in effect, conceded his ability to prevent the loss on the 13,170 shares. Kaufman there argued forcefully that he could have sold his unregistered shares short in the declining market, at full market value, borrowing certificates from his broker (Kaufman's witness

Walker) to deliver to the purchaser in the short sale. He urged that he could have limited his losses for the future, and incidentally registered a substantial speculative profit, with no obligation to deliver his own share certificates to cover the short position until two years later when the shares became deliverable as "free" stock under the Securities Act of 1933. With an inventory of 6,015 Diversified shares still in hand by Kaufman (2,000 had been sold for cash in April, 1969), a written promise from Diversified of 13,170 more, and a conceded ability to sell short with borrowed shares, minimizing losses on a money damage claim was a simple matter for Kaufman. A short sale was nothing more than a matter of financing with his broker or another lender. If Kaufman chose to cover his short sale within a few weeks by an open market purchase of $21 shares, he would then refuse the certificates delivered late by Diversified and demand their money value on August 1 —$21 per share to replace his expense of covering. In this case where the market was steadily declining, Kaufman could have ended the speculation by selling short without possessing share certificates. *Parsons* v. *Sutton, supra,* and *Hamilton* v. *McPherson, supra,* do not require only purchases; they require any "reasonable exertions to render the injury as light as possible."

Moreover, Kaufman could have avoided the damages merely by making a claim to Diversified, instead of lying-in-wait until August 1. If he had undertaken the "reasonable exertion" of merely speaking up, then Diversified could have taken steps to reduce the damages, by immediate delivery of the certificates for 13,170 shares concededly due (because its other commitments were modifiable), or by open market purchases by Diversified to hedge against further market fluctuation (see Ross testimony, 218a, Appendix in Circuit Court). Kaufman had the means to minimize damages merely by giving some notice of his position in June or early July, instead of waiting until he had certificates in hand to send his registered letter. He

willfully and unnecessarily allowed damages to be
creased, and while that may not be a complete defense
liability on all 14,739 shares, it was a bar to any dama
on the 13,170 shares he knew he had coming to him. *Fiore*
v. *Miller*, 183 N.Y.S. 2d 772, 775 (N. Y. County, 1959)
holds, and applies the further doctrine from *Rothschild*
Title Guarantee and Trust Co., 204 N.Y. 458, 464 (191
that no action whatsoever amounts to equitable estop
with respect to fluctuating shares.

C. ***Kaufman Failed To Give Adequate Notice Of T***
Breach Now Claimed. The final reason why the Distr
Court had to be reversed lies in settled doctrine on wh
constitutes adequate notice of breach, where the law of N
York and the Circuits is alike. The District Court held th
Kaufman's notification of insufficient performance on A
gust 1, 1969, the same day he accepted delivery of 13,1
shares, was adequate notice of breach to justify the $75,0
damages awarded for seven weeks' late delivery. The D
trict Court's conclusion was that U.C.C. 2-607 requires
buyer to notify a seller of breach "after the buyer has
cepted delivery of" the goods, and since no stock was deli
ered on the due date, Kaufman had no duty to notify un
August 1, 1969. The notice given on August 1 was n
itself adequate under the common law rule or the U.C.
embodiment thereof. This issue was not reached by t
Circuit Court because of its reversal on failure to sh
intent to resell, but it is a serious legal obstacle to Kau
man's recovery, and additional reason for concluding su
stantial justice was done by the Circuit Court's decisio

At the outset, the principle of *In re Carter's Clai*
supra, that U.C.C. Section 2, the Law of Sales, does n
apply to transactions such as this in investment securiti
was a complete answer to the conclusions of the Distri
Court. The common law of New York governs on th
point, not the U.C.C. At best, the U.C.C. can provi

only a possible analogy. But as will be shown, the common law and the U.C.C. call for the same legal conclusion on this point, to wit, Kaufman failed to give adequate notice of the breach of contract upon which the judgment he seeks to reinstate was rendered.

U.C.C., Section 2-607(3)(a) requires that the buyer "notify the seller of breach or be barred from any remedy." The breach that Kaufman gave notification of was *not* seven weeks' late delivery, but, rather, a failure to compute the number of shares as of the 20 days preceding August 1, 1969. First Kaufman signed a document acknowledging receipt of the shares "as per agreement." Then his notice of breach sent on the same day by registered mail, presumably to indicate its formal legal effect, said ". . . it is my understanding that the per share value was to be computed on an average price per share 20 days preceding issuance of the shares . . . I believe Diversified . . . is in error." This is the only breach Kaufman ever claimed in his notice, in his pleadings, or throughout the trial.

That claim of breach was based on an artificial construction of the contract which the District Court and the Circuit Court *both* ruled against, holding that computation of shares was not open-end until actual physical delivery of certificates, but that computation must occur within the 30 day period of promised delivery, held to have ended on June 4, 1969. Thus the District Court ruled (with no issue on the appeal) that the breach as to which Kaufman notified Diversified was not a breach at all. The Circuit Court expressly concurred on this legal issue (Pet. App. A, 7a). Kaufman never expressly made a claim arising from seven weeks' late delivery. It is well settled in New York and Pennsylvania, where the U.C.C. was first enacted, that the claim of breach under Section 2-607(3)(a) must be stated with reasonable particularity. See *Kelly* v. *Nick*, 38 Pa. Erie 61, 65 (1954). For New York antecedents to this

section of the U.C.C., see *Atwater & Co.* v. *Panama R. Co.*, 255 N.Y. 496, 503 (1931), where Justice Lehman said,

> "The buyer, both by what it said and by what it left unsaid, impliedly offered to receive belated delivery as satisfaction of the seller's obligation. Perhaps it might otherwise have refused. The defendant having asked and accepted delivery of the deficit in past due installments upon such an implied agreement, may not thereafter recover for breach of a promise to deliver earlier."

Another common law antecedent is *Hess* v. *Kaufherr*, 112 N.Y.S. 832, 833 (A.D. 1st, 1908), holding that a claim of breach must rest on specific grounds, and if delay in delivery is not asserted as a ground, it is not a basis for later asserting damages. In *Hess*, the buyer notified of a breach in merchantable quality of the goods only, and later tried to obtain damages for delayed delivery, but the Appellate Division properly excluded such element of damage. Accord: *Robinson Clay Products Co.* v. *Thatcher*, 150 N.Y.S. 658 (A.D. 1st, 1914); *J. F. Pennell* v. *New Jersey Brass Corporation*, 186 N.Y.S. 606 (A.D. 1st, 1921); *Belmet Products* v. *Merit Enterprises, Inc.*, 236 N.Y.S. 2d 254 (Civ. Ct. Kings, 1963); *Bangor Clothing Co.* v. *Superior Sportswear Corp.*, 254 N.Y.S. 2d 415 (A.D. 1st, 1964).

In the Southern District of New York, Judge Rifkind dealt with this specific issue in *In re Gotham Silver Co.*, 91 F. Supp. 520, 524 (S.D.N.Y., 1950) and held that notice of breach claiming delivery of wrong merchandise, cannot be used as a basis for recovery of damages for delayed delivery. We submit that notice of a breach claiming a wrong calculation under the contract, cannot be used as a basis for recovery of damages for delayed delivery. Judge Learned Hand dealt with the same issue in *American Mfg. Co.* v. *U. S. Shipping Board*, 7 F. 2d 565, 566 (2d Cir.,

1925), saying:

> "the larger part of the damages claimed was for the delay in delivery . . . Delay in delivery, of course, is a breach, and the plaintiff was obliged to give notice within a reasonable time after October 20, 1920 [late delivery date]. It did nothing till February 19, 1921, and four months is more than a reasonable time . . .
>
> ". . . The notice 'of the breach' required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning." [emphasis supplied]

What early warning did Diversified ever have of Kaufman's claim that seven weeks' delay in delivering 13,170 shares would justify $75,000 damages? The District Court was the first participant in the then two year old controversy to articulate the delayed delivery claim, and it was far too late for Kaufman to invoke it under the U.C.C. and its well-recognized common law antecedents.

Mr. Kaufman's citation of *Richard* v. *American Union Bank, supra,* in the Circuit Court and herein did not support his position on the delayed delivery point. Judge Lehman there stated, in evaluating a complaint alone, that a buyer of a commodity may accept delivery of the commodity after the stipulated date and may still retain his right of action for damages caused by delayed delivery. However, other cases make it clear that a claim for damages for delayed delivery must be the subject of prompt and adequate notice to the person who is late in making the delivery. The difficulty in Mr. Kaufman's whole position is that he never made a claim for late delivery, until

he had a judgment he wished to sustain in the Circuit Court. Instead, he sent a letter in August, 1969 arguing a specious theory of contract interpretation which left computation of the number of shares open indefinitely and logically precluded any claim for late delivery, on the theory that whenever delivery was made, a recomputation was required as of that date. *American Mfg. Co.* v. *U. S. Shipping Board, supra,* required Mr. Kaufman to give notice of a claim for delayed delivery, as to which the law required early warning. His notice on August 1, 1969 was not only deficient but it logically foreclosed any claim of breach for late delivery—the notice by its express terms negated the claim now made.

The notice made the statement "it is my understanding that the per shares value was to be computed on an average price per share twenty days preceding issuance of the shares . . . I believe Diversified Metals Corporation is in error." That statement of a continuing claim for faulty computation precludes a claim for late delivery. In Mr. Kaufman's brief in the Circuit Court, he argued that the notice omitted a specific description of what the "error" was, to justify his contention that he felt Diversified breached the contract, and that his notice conveyed that general thought. But the specific words of the notification modify the general word "error," and specific words set forth a claim of faulty computation intentionally and carefully made. This claim of faulty computation was reiterated in a complaint prepared by his lawyers setting forth the theory with precision, and followed by a lengthy proof on such theory. To convert such written claim two years later at trial into a claim for late delivery would be contrary to the principles of early warning stated by Judge Hand in *American Mfg. Co.* v. *U. S. Shipping Board, supra.*

Kaufman argued below that notice of the breach as explained by the Official Comment to Sec. 2-607, "need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched," a clear statement

of all the objections that will be relied on by the buyer is not required and the notification "need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation." Thus argued Kaufman from such Comment, his notice that the contract required a different method of computation, is as good as a notice that he was suffering market damages by delayed delivery of his shares. But as *2 Anderson on the U.C.C.* p. 220 states, "it is likely that the courts will interpret the code's provision more strictly than above indicated by the [quoted] Official Comment." This broad comment cannot undo decades of specific judicial interpretation on the requirement of a specific reservation of rights to sue for delay.

We submit that even under the broad language of the Official Comment quoted, Kaufman's notice of a claim of breach was woefully inadequate. *2 Anderson on the U.C.C.* p. 209 states plainly that "where the goods are delayed in reaching the buyer, the latter waives his right to claim damages for breach of contract by way of delay when he accepts the goods without a reservation of rights [as to delay] or fails to give notice of breach [for delay] thereafter." (Insertions supplied) It was just this sort of unsupported claim, used as a peg to draw in other claims later, that the rule of the common law and the U.C.C. was designed to prevent. Thus, the conclusion in the District Court on the adequacy of notice was also in error, and such error was a separate and unimpeachable ground for the Circuit Court's reversal on damages (petition for rehearing and rehearing *en banc* denied), which was not reached because of the other ground stated.

Conclusion

The reasonableness of the parties' behavior in the circumstances shown was the central issue on the appeal and underlay the conclusions of the Circuit Court. While settled

principles of the law of damages were applied, it was the nuances in the facts that pre-determined the outcome herein. From receipt of the May 5 commitment letter on May 14, 1969 and thereafter, Kaufman *knew* he had 13,170 shares committed to him in writing by Diversified. Whether one invokes the metaphysics of legal title under the U.C.C., or equitable title by contract or treats the May 5 letter as merely an irrevocable promise of partial performance, Mr. Kaufman had these shares effectively "locked up" and was speculating on their value to see if he could get more shares, waiting until August 1 when he had "the stock in hand" to advance a specious theory of contract interpretation to support his market play. The timetable shows behavior instinct with secretiveness and an attempt to preserve his options until be obtained the first block of shares promised to him. The confusion of the relevant theories in the District Court in the jury trial was a direct result of an artificial cause of action for $230,000, when at best his out-of-pocket damages for deprivation of 1,569 shares were barely 10% of the claim. Afterthought and overreaching were the dominant themes in his case.

This case was wrongly tried initially, and on the documents alone, Diversified believed Kaufman was not entitled to recover anything on his claim because equitable delivery accomplished full performance. But the Circuit Court decided that issue adversely to Diversified, and reversed only on the magnitude of damages for several sound reasons, none of which vary among the Circuits or the states. Mr. Kaufman did not lose his case because of new law, but because he behaved badly, as measured by established doctrines of the law merchant. This was essentially a factual case; Kaufman reached too far and shifted his ground too often, and his citing all the damage cases where courts did not consider the specific details of the parties' post-controversy behavior, cannot make his conduct equitable. To have awarded any more than $25,888.50 would have been to grant damages for a fall in paper value of

ommitted shares, and would have been an unconscionable eward to what was never anything more than a speculative nterprise. The Petition should be denied.

Respectfully submitted,

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ctober 16, 1972

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